IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

IN THE MATTER	of PAUL PRENDIVILLE a debtor
EX PARTE	EXOTIC BUILDING SUPPLIES LIMITED Originating Petitioner
A N D	TASMAN TRUSS & COMPANY LIMITED Substituted Petitioner

B 623/84

IN THE MATTER	of PAUL PRENDIVILLE a debtor
EX PARTE	NEVILLE CRICHTON Originating Petitioner
A N D	NEW ZEALAND NEWSPAPERS LIMITED Substituted Petitioner

B 691/84

IN THE MATTER	of PAUL PRENDIVILLE a debtor
EX PARTE	SCOTT PLUMBING LIMITED Originating Petitioner
A N D	FLETCHER MERCHANTS LIMITED Substituted Petitioner

Hearing: 28 November 1984

Counsel: B 122/84 Turner for Debtor on all petitions
Kirkpatrick for Tasman Truss & Co Ltd
Ferguson for G C MacRae

B 623/84 Green for New Zealand Newspapers Ltd and Fastening Systems Ltd

B 691/84 Graham for Fletcher Merchants Ltd

Delivered:7 December 1984

MINUTE OF THORP J

These three petitions were the first matters listed for the weekly sitting of this Court in Bankruptcy held on 28 November. They were the first of two sets of triple petitions against the same debtor in that day's list, which also contained several instances where two petitions had been issued against the same debtor.

The priority of listing of these three indicated that they were the oldest series of multiple petitions. A brief examination of the files indicated that in each the debt on which the original petition had proceeded had long since been paid, and that there had been numerous adjournments and orders for substitution of other creditors as petitioners.

A perusal of the file for B 122/84 showed that it was based on an act of bankruptcy alleged to have occurred in 1983, and that there had been eleven adjournments and, on the face of the file, four orders for substitution. The size and complexity of the file probably contributed to the fact that orders had been made on successive Wednesdays and on separate motions substituting different creditors as "the substituted petitioner".

Counsel appeared for the debtor and for four creditors, each of which claimed to have the status of a substituted petitioning creditor. I was invited to make

further adjournments by consent of all three petitions on a variety of grounds, namely -

1. Service of an amended petition;
2. Substitution of another creditor for the last substituted petitioner whose debt had been paid; and
3. Part payment and prospects of settlement.

I expressed concern at the growing practice of filing multiple petitions and pursuing each severally rather than with regard to the overall situation of the debtor and his ability to pay his debts. I invited counsel to consider whether that practice was in accordance with basic principle, and whether it could be reconciled with the Court's obligations to prevent indeterminate proceedings in bankruptcy, as evidenced by R 58. I also suggested that substantial difficulties were likely to arise from there being three different dates to which any adjudication might relate back.

Not too surprisingly, since counsel had not been given notice of those enquiries, the response was limited. Indeed, the only response was a submission by Mr Green that his client had a statutory right to substitution.

Both in order to avoid involving the large number of witnesses, debtors and counsel awaiting attention to other business, and in order to enable a better consideration of the apparent problems, I adjourned all three petitions for two weeks, to Wednesday 12 December, and advised counsel that I would give them a Minute setting out my views on their different applications.

Subsequent examination of the three files has strengthened my initial view that prosecution of several petitions against one debtor at the same time is a costly, time-consuming and wasteful procedure which the Court certainly should not encourage, and one which does not in my view accord with the spirit and intention of the Insolvency Act and Rules.

It is probably not necessary to detail the history of all three petitions. However, a brief summary of the history of the first, and basic data about the second and third, are necessary to give a reasonably clear picture of the significance of the present practice.

The petition in B 122/84 was filed by Exotic Building Supplies Limited on 2 March 1984 alleging an act of bankruptcy, the return of Nulla bona on a distress warrant, on 6 December 1983. Appearances on the petition have produced minutes to the following effect:

1.	18.04.84	Adjourned for settlement
2.	20.06.84	Substantial amounts paid - adjourned to enable completion
3.	18.07.84	Petitioner paid - Stimulus Fashions seeks substitution - adjourned
4.	15.08.84	Adjourned for settlement
5.	29.08.84	Stimulus Fashions paid - Newmarket Hardware seeks substitution - adjourned
6.	26.09.84	(a) Order substituting Newmarket Hardward as petitioner creditor (b) Adjourned
7.	3.10.84	Adjourned to enable settlement
8.	24.10.84	"Last adjournment"
9.	31.10.84	Newmarket Hardware paid - Tasman Truss Timber Co Ltd and Inland Revenue both to be substituted creditors - adjourned
10.	14.11.84	(a) Order substituting Tasman as petitioning creditor (b) Adjourned to 28.11.84
11.	20.88.84	On separate motion, order substituting G C MacRae as substituting creditor
12.	28.11.84	Counsel for Tasman and MacRae both appear and claim status as petitioning creditor. Counsel for Tasman seeks adjournment to serve his amended petition. Counsel for MacRae is advised by me that in my view the order made on 20.11.84, which he confirms was made without advice to the Court of the order previously made in favour of Tasman, must be regarded as being made per incuriam, and that I am not prepared to recognise MacRae as petitioning creditor.

For the reasons already noted, the petition was adjourned to 12 December 1984.

The second petition, B 623/84, was commenced by Neil Crichton Limited relying on an act of bankruptcy in the form of a failure to comply with a bankruptcy notice on 9 July 1984. New Zealand Newspapers Limited was substituted on 3 October 1984. Mr Green's advice to me was that its debt had been paid and that he sought an adjournment in order that another client, Fastening Systems Limited, could obtain substitution as petitioner.

The third petition, B 691/84, was commenced by Scott Plumbing Limited, relying on failure to comply with a bankruptcy notice on 5 July 1984. The second order for substitution in favour of Fletcher Merchants Limited was made on 24 October 1984. An adjournment was sought on the grounds of part payment by Mr Prendiville and prospects of settlement.

To date there have been five appearances on each of the two later petitions, apart from motions for substitution.

From the above summary it can be seen that each petition has proceeded independently of the others, and that the overall time and expense which this work has involved over the past year must have been very substantial.

This type of complexity would not have arisen under the old Bankruptcy Act. Prior to the coming into force of the Insolvency Act in January 1971, substitution had to be effected within three months of the act of bankruptcy relied on in the original petition - Re J (A Debtor) [1967] NZLR 763. However, s 26(9) of the Insolvency Act specified that a creditor seeking substitution was entitled to rely upon the act of bankruptcy alleged in the original petition. That addition was held in Ronaldson v Dominion Freeholds Ltd [1981] 2 NZLR 132 to evidence a legislative intention that the three months' time limit placed on original petitions did not apply to applications for substitution.

One of the main reforms introduced by the Insolvency Act was its promotion and encouragement of schemes for settling

debtors' liabilities outside formal bankruptcy. For this purpose Part XV of the Act made new and expanded provision for the settlement and approval of schemes of compromise, Court approval of such schemes having the effect of staying prosecution of bankruptcy petitions save with the leave of the Court. In Part XVI provision was made for Court approved Summary Instalment Orders, which gave the debtor the right to seek the stay of any petition in bankruptcy. Failure by the debtor to comply with any such arrangement would however entitle a petitioning creditor to revive his petition.

Those provisions clearly contemplate that there may be quite a lengthy delay between the filing and final disposal of bankruptcy petitions. To the extent that an approved scheme for settlement remains current, the legislature has decided that the interests of the general body of creditors is likely to be better served by allowing it to run, and accepted the problems arising from extended periods of relation back as a price worth paying. That situation gives additional support to the construction given to s 26(9) in Ronaldson v Dominion Freeholds Ltd.

However, it does not seem to me to alter the general obligation placed on the Court to prevent indeterminate bankruptcy proceedings. Rather, the existence of such a scheme would be evidence to show that the deferment of finality "would not be prejudicial to the general body of creditors", to adopt the language of R 58.

None of these petitions involve any such scheme of composition. Each has simply proceeded as a means of exerting limited pressure on the debtor, and the manner in which this has been done in my view has made it difficult for the Court to make a satisfactory overall assessment of the propriety of allowing the different petitions to be deferred.

Equally important, it seems to me, is the fact that a bankruptcy petition, once issued, is clearly a proceeding -

(i) For the benefit of the creditors as a whole, not simply the petitioning creditor, and

(ii) In which the Court is bound to pay regard to the public good and to the intention of the Bankruptcy and Insolvency legislation that a person who is not capable of paying his debts should not be encouraged to continue in business. If authority be needed for the above propositions, see (1) In re Lord Thurlow, ex p. Official Receiver [1895] 1 QB 724; Re Fletcher, ex p. Fletcher v Official Receiver [1956] Ch 28; and McDonald Henry & Meeks Australian Bankruptcy Law and Practice (4th ed) p 105 para 242 - "When a creditor presents a petition he does so not only for his own benefit, but also, though he is not always conscious of the fact, for the benefit of all the debtor's creditors"; and (2) Re a Debtor [1901] 2 KB 534 (CA); and Nisbett, ex p. Vala [1934] GLR 553.

It follows, in my view, that as a general rule no purpose is served by a creditor issuing a bankruptcy petition when another has already been issued and is being prosecuted. The removal of the time limitation for substitution by s 26(9) protects the right of any other creditor to seek substitution in the event that the prior petitioner fails to proceed with due diligence.

It may be that in some cases a creditor may have grounds for concern about the allegation of act of bankruptcy in the original petition. If that be the case, and there is no admission of such act of bankruptcy by the debtor, then in my view a creditor must be entitled to file a separate petition to avoid being prejudiced in the event that the prior allegation is not substantiated. However, I remain unable to see any purpose in the prosecution of that petition so long as the earlier petition is prosecuted with due diligence. Of course, if it is not proceeding with due diligence then it should be dismissed, in which case the second creditor could apply for an order on his petition contemporaneously with that dismissal in terms of s 26(6), or apply for leave to proceed independently with his own petition.

The Court has the power, under s 26(7), at any time to make an order staying proceedings under a creditor's petition, "for such time and on such terms, and subject to such conditions as the Court thinks fit." Although the same section authorises the making of a stay for the special purposes set out in subss (3), (4) and (5), I do not think there is any doubt that the view expressed in Spratt & McKenzie's Law of Bankruptcy (2nd ed) p 68 para 26-11, that the power to stay in subs (7) is an addition to that conferred by the earlier subsection, is correct. That view certainly accords with the English authorities, which do not seem to me to be distinguishable simply on the ground that there the different powers are contained in different sections.

I am not by any means so confident about the comment made in the subsequent paragraph that "it is arguable that the above subsection ... has wider effect and empowers the Court not only to stay proceedings on the petition or any file but also to refuse to receive another petition." There are too many cases in the English reports discussing the appropriate action when more than one petition is filed to make that proposition attractive. It is true that most of those cases consider petitions filed in different courts, but again, that circumstance does not seem to me to go to basic principle.

For quite some time now it has been accepted practice, in considering simultaneous or concurrent petitions for winding up, to allow a creditor presenting a petition in ignorance of a prior petition costs to the time he has notice of the first petition - see, Anderson's Company Law Service Vol.2 para 220.07. This also notes the gloss that, if the creditor believes the original petition is not bona fides and proceeds, he will still get his costs if his belief is right; Re General Financial Bank (1882) 20 Ch 2; Re Sheringham Development Co Ltd (1893) WN 5.

I can see no reason why a similar approach should not be applied to proceedings in bankruptcy.

I accordingly take the view that the appropriate direction in respect of these petitions is to advise that at the adjourned hearing on 12 December -

1. On petition B 122/84 -

Counsel for the last substituted petitioner, Tasman Truss Company Limited, is asked to take note of the fact that his client is seeking to proceed on a petition based on an act of bankruptcy allegedly committed on 6 December 1983, and that this circumstance makes it essential that he be able to satisfy the Court that the substituted petitioner is "proceeding with due diligence";

2. On petition B 623/84 -

Counsel for Fastening Systems Limited, the creditor seeking substitution, should be prepared -

(a) To give reasons why the Court should exercise its discretionary power to effect substitution if and so long as B 122/84 is being prosecuted with due diligence; and

(b) If there be some sufficient reason why Fastening Systems Limited should not rely on B 122/84, to show cause why further action on B 623/84 should not be stayed after substitution for so long as B 122/84 is being prosecuted with due diligence;

3. On petition B 691/84 -

Counsel for Fletcher Merchants Limited, if final settlement has not been achieved and he seeks to proceed on this petition, should be prepared to show cause why further action on this petition should not be stayed so long as B 122/84 is being prosecuted with due diligence.